Supreme Court, U.S.
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No. 93-984

In the Supreme Court of the United States

OCTOBER TERM, 1993

ANDRE BERNARD THOMPSON

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the *Feres* doctrine bars the personal injury suit of an active-duty serviceman who was injured while shopping at a military Post Exchange.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) and the judgment of the district court (Pet. App. A10-A11) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1993. The petition for a writ of certiorari was filed on November 26, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, then a member of the United States Marine Corps, injured himself while shopping at the 24 Area Post Exchange (PX) at Camp Pendleton, California, where he was stationed. Pet. App. A2, A4. The injury occurred when petitioner reached down to retrieve an item from the bottom shelf of a display and punctured his eye with a metal display rod affixed to the display wall. Petitioner was on liberty (off duty) status when his injury occurred. *Ibid.* Petitioner was totally disabled by the accident and was discharged from the military. *Id.* at A4-A5.

After the Marine Corps denied petitioner's administrative claim, petitioner filed a complaint in federal district court under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2674 *et seq.* The district court dismissed petitioner's complaint for lack of subject matter jurisdiction under the *Feres* doctrine because his injury occurred in the course of military service. Pet. App. A10-A11; see *id.* at A2-A3. The court of appeals affirmed. Concentrating on whether petitioner's injuries were "service-related," *id.* at A5-A8, the court noted that petitioner had access to the PX only by virtue of his status as an active-duty serviceman and that the PX was operated by and under the control of the United States Government. *Id.* at A6. Consequently, even though petitioner was engaged in a personal activity (shopping) at the time of the injury, *id.* at A7-A8, petitioner was challenging "the way in which the government ran the PX." *Id.* at A8. The court of appeals therefore held that petitioner's injuries were service related. Since no exception to the *Feres* doctrine applied, the court held that under

that doctrine petitioner could not bring an action under the FTCA.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decision of any other court of appeals. Further review therefore is not warranted.

1. *Feres* v. *United States*, 340 U.S. 135, 146 (1950), holds that the FTCA does not waive the United States' sovereign immunity "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." As both courts below held, petitioner's FTCA claims are barred by *Feres* because his injuries arose out of service related activities.

Feres itself involved soldiers who sued the military for injuries that arose from the government's management of military property and facilities. Two of the three consolidated cases in *Feres* concerned allegations that the Army had negligently provided medical services to the plaintiffs. *Feres*, 340 U.S. at 137. The third case involved allegations that the military had negligently provided housing services to a soldier who died in a barracks fire. *Id.* at 136-137. The claim in that third case was that the military had negligently maintained the defective heating plant that caused the barracks fire. *Ibid.*

Petitioner's FTCA claim is materially identical to the above claims for purposes of applying the *Feres* doctrine. Here, as in *Feres*, an active-duty soldier seeks to challenge the military's operation and management of a military facility (a PX). Although the military often contracts with private parties to help

operate PXs, a PX at all times remains under the command and control of the commanding officer. See Pet. App. A6-A7. Thus, just as the suits in *Feres* were against military officials responsible for the operation of the barracks and the military hospital, petitioner's FTCA suit is against military officials who are responsible for the operation and management of the PX.

No federal court of appeals has permitted a soldier who was on active duty and not on leave at the time of his or her injury to sue the military for the negligent provision of military services.[1] Rather, the courts have unanimously rejected such claims in a variety of contexts not relevantly different from the provision of PX services. See, *e.g.*, *Lauer* v. *United States*, 968 F.2d 1428 (1st Cir.) (maintenance of road), cert. denied, 113 S. Ct. 812 (1992); *Appelhans* v. *United States*, 877 F.2d 309 (4th Cir. 1989) (medical services);

[1] After the filing of the petition in this case, the United States Court of Appeals for the Eleventh Circuit addressed the applicability of *Feres* to "on leave" military personnel injured by the negligent provision of military housing. *Elliott* v. *United States*, No. 93-8027 (11th Cir. Feb. 15, 1994). The court held that "[m]ilitary personnel do not engage in activities incident to service when on leave, even if the military owns the apartment in which the service personnel reside." *Id.* at 19-20. While the petitioner here argues that the *Feres* doctrine does not apply because he was "effectively off duty on liberty status"—which he equates with being on furlough or leave—the court of appeals found that "[t]he relevant distinction . . . runs between servicepersons who are on 'active duty' and those who have been discharged or are on furlough, not between 'of duty' and 'on-duty' servicepersons." Pet. App. A6 (quoting *Persons* v. *United States*, 925 F.2d 292, 296 n.6 (9th Cir. 1991)). Because petitioner was "off duty" but not on leave, *Elliott* does not conflict with the instant case.

Dozler v. *United States*, 869 F.2d 1165 (8th Cir. 1989) (provision of security around barracks); *Bon* v. *United States*, 802 F.2d 1092 (9th Cir. 1985) (Navy canoe rental); *Woodside* v. *United States*, 606 F.2d 134 (6th Cir. 1979) (Air Force Aero Club), cert. denied, 445 U.S. 904 (1980); *Haas* v. *United States*, 518 F.2d 1138 (4th Cir. 1975) (Marine Corps stables).

The cases on which petitioner relies are inapposite. *Parker* v. *United States*, 611 F.2d 1007 (5th Cir. 1980), allowed a soldier to sue the military when he was involved in an automobile accident on a military base. The plaintiff there did not challenge the military's operation of the base or its roads. See *id.* at 1012 n.7. Rather, the plaintiff in *Parker* alleged that another driver, also a soldier, had negligently operated his vehicle on the base. The other case that petitioner cites, *Pierce* v. *United States*, 813 F.2d 349 (11th Cir. 1987), is also an automobile accident case, distinguishable from the present case on the same grounds as *Parker*.

2. Petitioner contends that *Feres* is inapplicable here because he was off duty at the time of the accident. See Pet. 10-12. The courts of appeals have unanimously ruled, however, that as long as a soldier was on active duty and not on leave when the accident occurred, the soldier may not sue the military alleging negligent provision of military services. See *Persons* v. *United States*, 925 F.2d 292, 296 & n.6 (9th Cir. 1991) (off-duty use of naval hospital); *Millang* v. *United States*, 817 F.2d 533 (9th Cir. 1987) (off-duty use of military picnic area), cert. denied, 485 U.S. 987 (1988); *Woodside*, 606 F.2d at 142 (off-duty use of Air Force Aero Club). Although petitioner was off duty,

petitioner was on *active* duty and not on leave at the time of the accident.

3. Petitioner also contends that the activity in which he was engaged at the time of his accident—making purchases at a military facility—was not service related because it was a purely personal act unrelated to the fact of its occurrence on a military base. Pet. 14-16.[2] Petitioner, however, was entitled to utilize the PX only because of his status as an active-duty soldier, and he was subject to military control and orders while engaging in that activity. See *Solorio* v. *United States*, 483 U.S. 435 (1987). His presence in the PX therefore arose out of his military service just as one of the *Feres* plaintiffs' act of sleeping in his barracks when they caught on fire was incident to his military service. 340 U.S. at 137.

4. Finally, petitioner contends that the *Feres* doctrine does not bar his claim because the PX at Camp Pendleton is a nonappropriated fund instrumentality (NAFI). See Pet. 17. This argument fails because NAFIs perform essential military functions and are under the command and supervision of military officials, as the courts of appeals have pointed out in uniformly applying *Feres* to bar FTCA suits

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[2] Petitioner contends (Pet. 13-14) that the occurrence on a military base of an injury is not determinative for *Feres* doctrine purposes. The court of appeals did not disagree. The court addressed the relevance of the location of the accident, stating that "whether the accident happened in an area available to plaintiff 'solely by virtue of his status as a serviceman' and whether that area was under the complete control of the commanding officer" are relevant—not determinative—factors in determining whether injuries are service related. Pet. App. A5 (quoting *Millang*, 817 F.2d at 535).

arising out of accidents involved in the administration of NAFIs. See *Bozeman* v. *United States*, 780 F.2d 198 (2d Cir. 1985); *Roush* v. *United States*, 752 F.2d 1460 (9th Cir. 1985); *Woodside* v. *United States*, 606 F.2d 134 (6th Cir. 1979). See also Pet. App. A6-A7 ("[Petitioner] alleged that the PX was 'a facility operated by and under the control of the United States Government.' ").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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